

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re U.S. Patent Application of:	:	
	)	
Jan Abraham VAN ASSELT	:	Atty. Ref: 115692-00101
	)	
Serial Number: 09/980,092	:	Group Art Unit: 3711
	)	
Filed: February 11, 2002	:	Examiner: Alvin A. Hunter
	)	
For: BALL GAME APPARATUS	:	

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**APPEAL BRIEF**

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**Real Party in Interest**

This appeal is taken from a final rejection of pending claims submitted for examination in U.S. Patent Application Serial No. 09/980,092, which was filed in the name of Jan Abraham Van Asselt (“the Van Asselt Application” or “application”), the real party in interest.

**Related Appeals and Interferences**

No other appeals or interferences are known to Applicant-Appellant or Applicant-Appellant's legal representatives that will directly affect or be directly affected by or have a bearing on the Board's decision in this appeal.

**Status of Claims**

Claims 15-28 are pending in the application (see Appendix 1 for a listing of the claims). The pending claims were finally rejected in a final Office Action (“the Office Action” or “the final Office Action”) mailed to Applicant-Appellant’s legal representatives on July 25, 2003 (a copy of which is attached as Appendix 2).

Claims 15-28 are the subject of this Appeal.

**Status of Amendments**

Applicant-Appellant submitted an Amendment After Final Rejection on January 26, 2004, (a copy of which is attached as Appendix 3) in response to the final Office Action. In the Amendment After Final Rejection, some of claims 15-28 were amended and new claim 29 was intended to be added to the application. The Amendment After Final Rejection was not entered in the record, as noted in the Advisory Action mailed to Applicant-Appellant's legal representatives on February 10, 2004 (a copy of which is attached as Appendix 4). Thus, the amendments made to some of claims 15-28 and new claim 29 were not entered in the record.

All amendments prior to the final rejection have been entered.

### Summary of Invention

The Van Asselt application discloses an apparatus for practicing swinging a golf club or other instrument to loft a ball. The only figure in the application, Figure 1, reproduced below, illustrates the preferred embodiment of the invention. A concise explanation of the invention follows. A more detailed description and explanation of the invention may be found in the as-filed application.

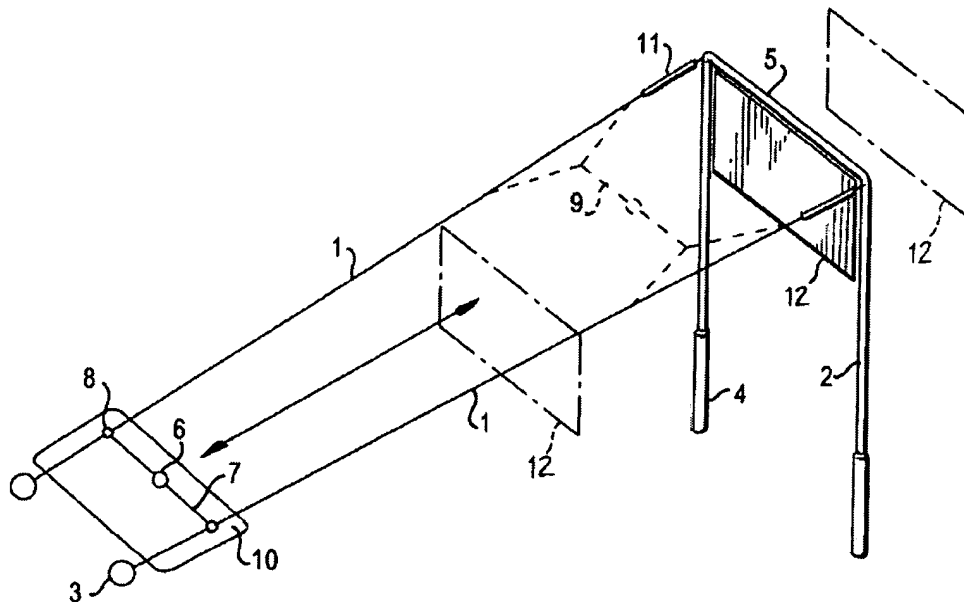


FIG. 1

As shown in Figure 1 above, which illustrates the preferred embodiment of the invention, the invention includes two guideways 1 that are attached at their ends to supports 2 and anchorages/pegs 3. Also included are metal supports 4, support pole 5, ball 6, substantially inelastic line 7, loops/rings 8, teeing-off mat 10, winding/retaining means 11, which is used for storing the guideways 1, and target/backboard 12.

Application at 6-7.

As described in the application, the supports 2 and anchorages/pegs 3 are typically spaced approximately 10-12 meter apart. The height of the top of the supports 2 is typically 2 meters. The support pole 5 maintains the tops of the supports 2 at a predetermined distance apart. Each end of the substantially inelastic line 7 is attached to the loops/rings 8. Application at 6.

Also as described in the application, there are two positions of the ball 6 and the substantially inelastic line 7 shown in full and broken lines in Figure 1. The two positions are indicated by the two-headed arrow. In the starting or striking position, each of the ball 6, which is depicted resting on the teeing-off mat 10, the substantially inelastic line 7 and the guideways 1 are shown by the full line. A player stands near the ball 6 and strikes the ball with a golf club or other instrument. The force of the strike sends the substantially inelastic line 7 and the ball 6 along the guideways 1. After the ball 6 is struck, the loops/rings 8 and the substantially inelastic line 7 connected thereto, traverse a portion of the length of the guideways 1 toward the second position shown by the broken line designated by reference number 9. According to the application, once the distance between the ends of the substantially inelastic line 7 becomes limiting in relationship to the spacing of the guideways 1, the substantially inelastic line 7 stops and is deflected back to along the guideways 1 to the player primarily by the force of gravity acting on the ball 6 and the inward deflection of the guideways 1 as shown by the broken line. Application at 6-7.

In other disclosed embodiments of the invention, the supports 2 may be placed such that the guideways 1 are substantially parallel; the target/backboard 12 may be placed in the path of trajectory of the ball 6; and the supports 2 may be replaced with interconnected tripods which allow the guideways 1. Application at 6-7.



### Issues

The issues for review in this Appeal are as follows:

A. Whether claims 15-28 satisfy the requirement of 35 U.S.C. § 112, first paragraph. In particular, whether one of ordinary skill in the art would be able to make and/or use the invention if, as the Examiner contends, there is no explicit disclosure of a minimum and maximum spacing of the guideways or if there is no explicit description of a buffering and/or deflector means, how the tension mechanism is used, or how the inclination of the guideways is varied.

B. Whether claims 15-28 satisfy the requirement of 35 U.S.C. § 112, second paragraph. In particular, whether the recitation in claim 15 of "...whose length greater than the minimum spacing of the guideways and less than the maximum spacing of the guideways..." particularly points out and distinctly claims the subject matter which the applicant regards as his invention.

C. Whether claims 15-27 are patentable, under 35 U.S.C. § 103(a), over Great Britain Patent No. 201,645 to *Gilbey-Thompson* in view of U.S. Patent No. 3,630,521 to *Lingbeek*.

### **Grouping of Claims**

The claims presented on appeal do not “stand or fall together.” For each ground of rejection that applies to a group of claims, all of the claims of the group will not stand or fall based on the Board’s decision on appeal as to any one of the claims of the group. The claims are grouped as set forth below in the Argument.

### **Argument**

#### **A. It is error to reject claims 15-28 under 35 U.S.C. § 112, first paragraph**

##### **1. Summary of the rejection**

The rejection of claims 15-28 under 35 U.S.C. § 112, first paragraph, is based on the assertion that the inventions recited therein are not enabled by the specification. The basis for the Examiner's rejection is essentially a repeat of his previous rejection contained in the December 12, 2002, Office Action. As noted in the final Office Action, the Examiner raised the following questions:

What is the minimum spacing and maximum spacing of the guideways? What is the buffering and/or deflector means? How is the tension mechanism used? How is the inclination varied? The above are just a few questions showing that the specification does not make it clear as how to make the invention.

Ex. 2 at 3.

##### **2. Applicable law.**

Under 35 U.S.C. §112, first paragraph, the statute requires "only that the inventor enable one of skill in the art to make and use the full scope of the claimed invention." CFMT Inc. v. Yieldup International Corp., 68 U.S.P.Q.2d 1940, 1944 (Fed. Cir. 2003). Thus, it is the claims that must be enabled by the specification.

"The enablement requirement is satisfied when one skilled in the art, after reading the specification, could practice the claimed invention without undue experimentation." AK Steel Corp. v. Sollac, 68 U.S.P.Q.2d 1280, 1287 (Fed. Cir. 2003) (citing cases). "The determination of what constitutes undue experimentation in a given case requires the application of a standard of reasonableness, having due regard for the nature of the invention and the state of the art." In re Wands, 8 U.S.P.Q.2d 1400, 1404 (Fed. Cir. 1988) (citing Ansul Co. v. Uniroyal, Inc., 169 U.S.P.Q. 759, 762-63 (2d Cir.

1971), cert. denied, 172 U.S.P.Q. 257 (1972)). “The test is not merely quantitative, since a considerable amount of experimentation is permissible, if it is merely routine, or if the specification in question provides a reasonable amount of guidance with respect to the direction in which the experimentation should proceed.” Id.

**3. Argument: The specification enables the claims.**

**a. Minimum and maximum spacing of the guideways.** Claim 15 recites “...a substantially inelastic reciprocating line connected to and freely movable along said guideways, whose length is equal to or greater than the minimum spacing of the guideways and less than the maximum spacing of the guideways...” In the Office Action, the Examiner questions, “What is the minimum spacing and maximum spacing of the guideways?”

As disclosed in the specification, the guideways diverge. See Figure 1. Thus, the spacing between the guideways at the anchorages/pegs 3 is less than the length of the substantially inelastic line 7. Moreover, the spacing between the guideways at the supports 2 is greater than the length of the substantially inelastic line 7. The minimum and maximum spacing between the guideways is dictated by the length of the substantially inelastic line 7 and (vice versa) by the fact that the guideways diverge. This divergence of the guideways 1 and the relative spacing of the ends of the guideways with respect to the length of the substantially inelastic line 7 is clearly illustrated in Figure 1 above. However, the actual minimum and maximum values, or ranges of values, is irrelevant for purposes of enabling one of ordinary skill in the art to make and/or use the invention.

The specification discloses that the distance between the anchorages/pegs 3 and the supports 2 is preferably about 10-12 meters and that the height of the top of the supports above the ground is about 2 meters. Thus, while no minimum or maximum spacing is specified, the specification provides a starting point from which one of ordinary skill in the art can determine a suitable minimum and maximum spacing of the

guideways 1 in order to make and/or use the invention. However, it is error to say, as the Examiner does, that the claims must be limited to the disclosed preferred embodiment. See SuperGuide Corp. v. DirecTV Enterprises Inc., 69 U.S.P.Q.2d 1865, 1869 (Fed. Cir. 2004) (“Though understanding the claim language may be aided by the explanations contained in the written description, it is important not to import into a claim limitations that are not a part of the claim. For example, a particular embodiment appearing in the written description may not be read into a claim when the claim language is broader than the embodiment.”).

Clearly, the minimum spacing of the guideways 1, at the point where they connect to the anchorages/pegs 3, is approximately the diameter of the ball 6. However, the specification describes how a player “...stands near the lowermost end of the guideways 1 at their point of connection to the ground pegs 3...” and strikes the ball. Clearly, the player will most likely stand outside the guideways 1 to avoid contacting the substantially inelastic line 7. One of ordinary skill in the art, therefore, reading that part of the specification, would understand that the ball 6 must be placed at a position where a player standing outside the guideways 1 holding a golf club can strike the ball 6. That position can be estimated based on knowledge of a typical golf player’s stance over a golf ball and the length of a typical golf club. Thus, the minimum spacing of the guideways 1 can be greater than the diameter of the ball 6 as long as a player can reach the ball with a golf club. Thus, the specification provides additional disclosure from which one of ordinary skill in the art can determine the minimum spacing of the guideways 1 without undue experimentation. For the same reasons, an approximate length of the substantially inelastic reciprocating line can be determined.

With regard to the maximum spacing of the guideways at the point where they connect to the supports 2, it is clear from the specification that after the ball 6 is struck by a player and the ball 6 and the substantially inelastic line 7 traverse along the guideways, the distance between the ends of the substantially inelastic line 7 becomes the same as the distance separating the guideways 1 so that the substantially inelastic line 7 stops and is deflected back to along the guideways 1 to the player. Thus, when

the minimum spacing of the guideways 1, the length of the substantially inelastic line 7 and the length of the guideways 1 are approximately known, the maximum spacing of the guideways at the point where they attach to the supports 2 can be determined by simple geometry. Thus, the specification provides guidance from which one of ordinary skill in the art can determine the maximum spacing of the guideways 1 without undue experimentation.

Accordingly, one skilled in the art, after reading the specification, could practice the claimed invention because the specification provides a reasonable amount of guidance with respect to the direction in which the experimentation should proceed. While it may require some adjustments of the guideways to find an appropriate degree of spacing and line lengths, that experimentation is by no means “undue.”

b. **Buffering and/or deflector means.** In the Office Action, the Examiner questions, “What is the buffering and/or deflector means?” There are no pending claims reciting a “buffering” and/or “deflector means.” Thus, it is error to reject claims 15-28 under 35 U.S.C. § 12, first paragraph, on the grounds that “the specification does not make it clear as how to make the invention.” Ex. 2 at 3. The claimed invention must be enabled by the specification; the specification does not have to enable itself. See, e.g., CFMT Inc. v. Yieldup International Corp., 68 U.S.P.Q.2d 1940, 1944 (Fed. Cir. 2003) (noting that under 35 U.S.C. §112, first paragraph, the statute requires “only that the inventor enable one of skill in the art to make and use the full scope of the *claimed invention*.”) (emphasis added).

c. **Tension mechanism.** Claim 26 recites “...tensioning means for varying the tension of the or each guideway.” Claim 27 recites “wherein the tensioning means comprises a reeling mechanism.” In the Office Action, the Examiner questions, “How is the tension mechanism used?”

The tensioning device is fully described in the application. Application at 3, fifth paragraph. It is also shown, in one embodiment of the invention, on Figure 1 by

reference number 11. As described in the specification, the guideways can be maintained taut between the ground anchorages/pegs 3 and the top of the stable supports 2 by the tensioning device 11. In one embodiment of the invention, the tensioning device is a simple reel attached near the stable support (or near the anchorages) as shown in Figure 1. Such reels are well known and simply comprise a mechanism that enables one to shorten or lengthen the effective length of a line thereby varying the tension in the line.

A person skilled in the art would understand from the specification that there are many ways in which the tension of each guideway can be varied, one of which comprises the reel referred to in the specification. Thus, given the straightforward nature of the invention, the specification provides a reasonable amount of guidance with respect to the direction in which any experimentation should proceed to make and/or use the claimed invention. At the very least, only a very little experimentation would be required to tighten the guideways 1, especially where the specification provides a roadmap for using a simple reeling mechanism. Accordingly, the specification is enabling with respect to the invention claimed in claims 26 and 27.

**d. Inclination varied.** Claim 19 recites “wherein means are provided for varying the length of the guideways and/or their angle of inclination above ground level.” In the Office Action, the Examiner questions, “How is the inclination varied?”

With regard to how the inclination is varied, the specification discloses the structure and function of the mechanism for varying the inclination of the guideways 1. Application at 6, first paragraph (lines 5 and 6). Specifically, the specification describes that the height of each support 2, held vertical by assistance of metal supports 4, is “adjustable.” Adjusting the height of the top of the stable supports is one method of adjusting the inclination of the guideways in the embodiment shown in Figure 1.

Again, from the perspective of one of ordinary skill in the art, there can be no doubt that little, if any, experimentation would be required to determine how to use the

invention disclosed in the specification, specifically how it can be manipulated to incline the guideways as shown in Figure 1. As noted above, the inclination can simply be varied by increasing or reducing the distance between the anchorages/pegs 3 and the supports 2, or by varying the height of the supports 2.

For the reasons described above, the Examiner has not established a prima facie case of lack of enablement under 35 U.S.C. §112, first paragraph, with regard to claims 15, 19, 26 and 27 and it was error to reject those claims on that basis. Since claims 16-18, 20-25 and 28 depend from claim 15, it is also error to reject those claims.

**B. It is error to reject claims 15-28 under 35 U.S.C. § 112, second paragraph**

**1. Summary of the rejection**

The rejection of claims 15-28 under 35 U.S.C. § 112, second paragraph, is based on the assertion that the claims are indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. With regard to claim 15, the Examiner contends that the claim and supporting disclosure are deficient with respect to what the minimum and maximum spacing of the guideways 1 should be. App. 2 at 3. Claims 16-28 were rejected for depending on rejected claim 15. Id.

**2. Applicable law.**

“[I]f the claims read in light of the specification reasonably apprise those skilled in the art of the scope of the invention, § 112 [second paragraph] demands no more.” Miles Lab., Inc. v. Shandon, Inc., 27 U.S.P.Q.2d 1123, 1140 (Fed. Cir. 1993); Honeywell Int’l, Inc. v. ITC, 68 U.S.P.Q.2d 1023, 1028 (Fed. Cir. 2003) (citing cases) (“The definiteness requirement [] focuses on whether the claims, as interpreted in view of the written description, adequately perform their function of notifying the public of the scope of the patentee’s right to exclude.”).



The fact that claims “include species which might not meet the objects of the invention does not by itself prove that one skilled in the art cannot ascertain the scope of the asserted claims.” See N. Am. Vaccine, Inc. v. Am. Cyanamid Co., 28 U.S.P.Q.2d 1333, 1339 (Fed. Cir. 1993). That is, there is nothing indefinite about claim language simply because it covers embodiments that may be inoperable. Exxon Research and Engineering Co. v. United States, 60 U.S.P.Q.2d 1272, 1282 (Fed. Cir. 2001).

**3. Argument: Claim 15 is not indefinite.**

The rejection of claim 15, under 35 U.S.C. § 112, second paragraph, is in error because the element “...a substantially inelastic reciprocating line connected to and freely movable along said guideways, whose length is equal to or greater than the minimum spacing of the guideways and less than the maximum spacing of the guideways...”<sup>1</sup> is not indefinite.

As any person of ordinary skill would conclude from reading the specification, the recitation of elements in claim 15 can be partially summed up as follows: for a line having length “x,” the distance between the guideways at their closest or minimum separation is less than “x” and the distance between the guideways that at their maximum separation is greater than “x.” The actual minimum and maximum distances are not relevant, only the relative dimensions. Thus, claim 15 reads on any length “x,” and thus any minimum and maximum separation distances between the guideways 1, limited only by the relevant prior art. Thus, the claim is not indefinite because it reasonably apprises those skilled in the art of the scope of the invention.

Obviously, as described above, one of ordinary skill will understand that the invention will not work in the manner disclosed in the specification if the “substantially inelastic reciprocating line” is one mile long, or, conversely, one millimeter long. But those, or other limits, do not have to be recited in the claim to make the claim definite and satisfy 35 U.S.C. § 112, second paragraph.

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<sup>1</sup> The Examiner misquotes claim 15 as reciting “...whose length greater than the minimum spacing of the guideways and less than the maximum spacing of the guideways...”

For the above reason, the Examiner has not properly established, under 35 U.S.C. §112, second paragraph, that claim 15 is indefinite. Thus, it is error to reject claim 15 on that basis. Because claims 16-28 depend from claim 15, it is also error to reject those claims under 35 U.S.C. § 112, second paragraph.

**C. It is error to reject claims 15-27 under 35 U.S.C. § 103(a)**

**1. Summary of the rejection**

Claims 15-27 stand rejected as being unpatentable, under 35 U.S.C. § 103(a), over Great Britain Patent No. 201,645 to *Gilbey-Thompson* in view of U.S. Patent No. 3,630,521 to *Lingbeek*.

With regard to the claim 15, the basis for the rejection under 35 U.S.C. § 103(a) is that *Gilbey-Thompson* discloses every feature of the invention except for “wires being [in]elastic”<sup>2</sup> but that *Lingbek* discloses the use of “low friction lines” that the Examiner contends must be substantially inelastic and one of ordinary skill in the art at the time of the invention would have been motivated to use low friction lines in order to facilitate the smooth movement of the ball in *Gilbey-Thompson* after it has been struck. App. 2 at 5.

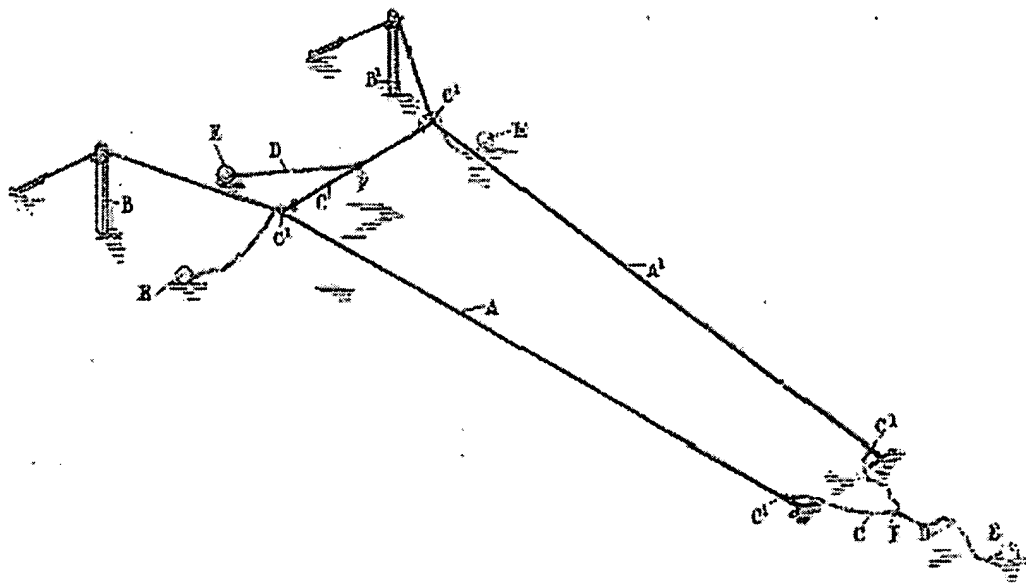
**2. Summary of the cited prior art**

**a. Gilbey-Thompson.** *Gilbey-Thompson* discloses a golf-practicing device that comprises “two slightly diverging wires or cords secured to the ground or to stakes or poles driven therein, and a transverse wire or cord connected slidably at its ends as by rings to the said diverging wires or cords.” Page 1, lines 62-68. The invention is described as including two diverging wires A, A<sup>1</sup>, stakes or poles B, B<sup>1</sup>, transverse cord C, rings C<sup>1</sup>, and cord D connected at one end to the ball E and at the other end to the cord C by a ring F. The only figure included in *Gilbey-Thompson*, as

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<sup>2</sup> Applicant-Appellant submits that the Examiner meant to say “inelastic” when he rejected claim 15 over the *Gilbey-Thompson* reference.

reproduced below, illustrates two positions for the ball E and cords C and D: broken lines to the lower right, which indicate the ball E in a pre-struck position, and solid and broken lines to the upper left indicate three possible final positions of the ball E after the ball comes to rest.

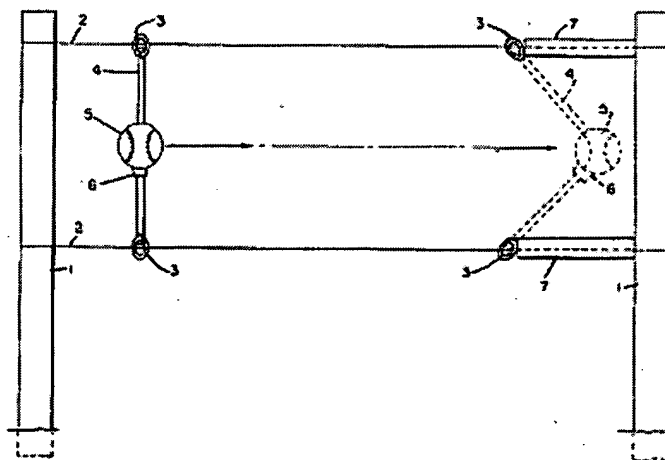


As disclosed in *Gilbey-Thompson*, the purpose of the device is to practice a golf swing by hitting the ball and observing where it lands relative to the diverging wires A, A<sup>1</sup>. As disclosed, “[T]he final position of the ball indicates to the player the true position in which the ball would have traveled had it been free. The distance up the track to which the ball reaches before being brought to rest is an indication of the power of the stroke.” Page 2, lines 46-52.

In other words, as shown in the figure and disclosed in the patent, if the ball E comes to rest about midway between the track wires A, A<sup>1</sup>, it may be assumed that the ball was struck “squarely.” If, however, the ball E lies to one side or the other of the track wires A, A<sup>1</sup>, it may be assumed that the ball was “pulled” or “sliced” upon being struck. Page 2, lines 39-45.

Finally, there is no teaching or suggestion that the ball E returns to its pre-struck position shown in broken line in the figure after the forward movement of the ball E is stopped.

b. **Lingbeek**. *Lingbeek* discloses a baseball batting practice device as shown in Figure 1 of the patent (reproduced below). The invention is described as including two posts 1 (or trees, building, poles or other supports), two spaced apart wires 2, a ring 3 (or hooks or pulleys), elastic cord 4 (or rubber cord, cord, spring or the like), ball 5, tube 6, and two stops 7. As shown in Figure 1 of *Lingbeek*, the ball 5 and elastic cord 4 are shown in a first position by a solid line and an alternate position by a broken line. The arrow indicates the motion of the ball after being struck by a batter.



## 2. Applicable law.

A patent claim may not be allowed “if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.” 35 U.S.C. §103(a)

(2000). An obviousness analysis is based on four underlying factual inquiries, the well-known *Graham* factors: (1) the scope and content of the prior art; (2) the differences between the claims and the prior art; (3) the level of ordinary skill in the pertinent art; and (4) secondary considerations, if any, of nonobviousness. Graham v. John Deere Co., 383 U.S. 1, 17-18 (1966); Kegel Co., Inc. v. AMF Bowling, Inc., 44 U.S.P.Q.2d 1123, 1130 (Fed. Cir. 1997). In the case where two or more references are cited and used to assert obviousness, the law requires that the references contain some “teaching, suggestion or reason” to combine the them. See Gambro Lundia AB v. Baxter Healthcare Corp., 42 U.S.P.Q.2d 1378, 1383 (Fed. Cir. 1997). “The level of skill in the art may inform whether the artisan would find a suggestion to combine in the teachings of an exemplar of prior art. Where the level of skill is high, one may assume a keener appreciation of nuances taught by the prior art. Similarly, appreciation of the differences between the claims in suit and the scope of prior art references—a matter itself informed by the operative level of skill in the art—informs the question of whether to combine prior art references.” McGinley v. Franklin Sports Inc., 60 U.S.P.Q.2d 1001, 1008 (Fed. Cir. 2001).

**3. Argument. The references cited by the Examiner, taken as a whole, do not suggest the claimed subject matter.**

The rejection of claims 15-27, under 35 U.S.C. § 103(a), is in error because the Examiner did not establish a *prima facie* case of obviousness. In particular, the elements “a substantially inelastic reciprocating line connected to and freely movable along said guideways” and “a ball connected to and generally coaxial with said reciprocating line,” as recited in claim 15, are not taught by either one of or a combination of the *Gilbey-Thompson* or the *Lindbeek* references. Even if, *arguendo*, the combination of those references taught all of the elements recited in claim 15, there is no motivation, as suggested by the Examiner, to combine the references in the first place to come up with the claimed invention.

a. **Gilbey-Thompson does not teach the invention.** As shown in the figure above, *Gilbey-Thompson* discloses a golf practicing device that comprises two slightly diverging wires or cords secured between ground anchors and a pair of upstanding stakes. The Examiner correctly points out that *Gilbey-Thompson* does not disclose all of the features of claim 15. In particular, there is no teaching of “a substantially inelastic reciprocating line connected to and freely movable along said guideways” and “a ball connected to and generally coaxial with said reciprocating line.” Indeed, the transverse cord C and the cord D connected at one end to the ball E and at the other end to the cord C by a ring F, are not the same as the elements recited in claim 15.

b. **Lingbeek does not teach the invention.** In *Lingbeek*, there is no teaching of “a substantially inelastic reciprocating line connected to and freely movable along said guideways.” In fact, *Lingbeek* teaches that the cord 4 is elastic. The elastic cord 4 is positioned between two spaced apart horizontal guideways that are parallel (i.e., they do not diverge). The cord converts the kinetic energy of the ball, after it is struck by a bat, into potential energy which is then used to propel the ball back to the player. Thus, claim 15 is also clearly distinguished over the teaching of *Lingbeek*.

c. **There is no motivation to combine *Gilbey-Thompson* and *Lingbeek*.** As understood from the Examiner’s reason for the obviousness rejection, it is asserted that *Gilbey-Thompson* teaches every element of the claims except it does not disclose wires being substantially inelastic, but that *Lingbeek* discloses low friction lines that enhance travel of the lines connected to the guideways and one of ordinary skill in the art would have been motivated to use low friction lines taught in *Lingbeek* in place of the non-elastic lines in *Gilbey-Thompson* to facilitate the smooth movement of the ball of the present invention after it has been struck.

Applicant submits that the Examiner’s reasoning does not establish a prima facie case of obviousness. The main differences between the present claimed invention and

the prior art teachings of *Gilbey-Thompson* and *Lingbeek* are not addressed by the combination of the two patents. Modifying the non-elastic wires in *Gilbey-Thompson* with the so-called low friction guideways taught in *Lingbeek* would not result in the a device that operates like the present invention that has two diverging guideways, a substantially inelastic reciprocating line between the two guideways, and a ball connected to and generally coaxial with the substantially inelastic reciprocating line, as recited in claim 15.

And even if the two references did teach that combination of elements, which Applicant submits they do not, the Examiner has not stated any motivation to combine those two references to come up with the claimed subject matter recited in claim 15 and that operates in the way disclosed in the specification. The motivation cited by the Examiner – to facilitate the smooth movement of the ball after it has been struck – is not the purpose of the diverging guideways and the substantially inelastic reciprocating line. Therefore, one of ordinary skill in the art would not have been motivated to use *Lingbeek* to modify the teaching in *Gilbey-Thompson* to come up with the present invention.

In fact, the modification suggested by the Examiner would destroy the intended purpose, and some of the utility, of the invention disclosed in *Gilbey-Thompson*. In order to modify the invention disclosed in *Gilbey-Thompson* to come up with the invention recited in claim 15, there must be some motivation to eliminate the cord D and move the ball E to the transverse cord C. However, making that modification would destroy the stated purpose of the invention disclosed in the patent. By removing the cord D and moving the ball E to the transverse cord C, the ball E would never come to rest in any position other than between the wires A, A<sup>1</sup>. Thus, the player would not be able to tell from the final position of the ball E if he or she “pulled” or “sliced” the ball E.

Thus, that system is contrary to the present application where the ball is caused, by the reaction between the substantially inelastic ball-carrying line and the diverging guideways to produce a whip-like reaction which causes the reciprocating line with the

ball attached to return to the original striking position. It is the line connecting the ball to the reciprocating line of *Gilbey-Thompson* which prevents the return of the ball to the striking position. In the present application, it is the location of the ball generally coaxial with the reciprocating line which enables the ball to be returned in the manner described in the specification. Thus, claim 15 is clearly distinguished over the combined teachings of *Gilbey-Thompson* and *Lingbeek*.

For the above reasons, the Examiner has not established a prima facie case of obviousness under 35 U.S.C. §103(a) and it was error to reject claim 15 on that basis. Because claims 16-27 depend from claim 15, it is also error to reject those claims under 35 U.S.C. § 103(a).

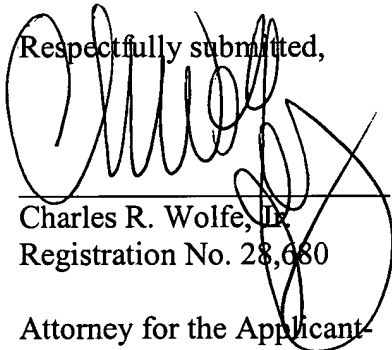


**Conclusion**

For all the reasons stated above, the Applicant-Appellant requests that the Board reverse the Examiner's rejections as noted above and instruct the Examiner to confirm the patentability of the rejected claims and issue a notice of allowability.

The Commissioner is hereby authorized to charge Deposit Account No. 23-2185 with the \$165.00 fee for a small entity for filing a brief in support of an appeal. Any additional fees due or any overpayment of fees are requested to be charged or credited to Deposit Account No. 23-2185.

Respectfully submitted,



Charles R. Wolfe, Jr.  
Registration No. 28,680

Attorney for the Applicant-  
Appellant

BLANK ROME LLP  
Watergate  
600 New Hampshire Ave., N.W.  
Washington, D.C. 20037  
Telephone: (202) 772-5800

Date: March 26, 2004

**APPENDIX 1**  
**LISTING OF CLAIMS**

**LISTING OF CLAIMS:**

Claims 1 - 14 (Cancelled).

Claim 15 (Original): Apparatus for improving the skill of a sports person which comprises two upwardly inclined side by side diverging guideways, a substantially inelastic reciprocating line connected to and freely movable along said guideways, whose length is equal to or greater than the minimum spacing of the guideways and less than the maximum spacing of the guideways and a ball connected to and generally coaxial with said reciprocating line.

Claim 16 (Original): Apparatus as claimed in Claim 16, wherein one end of each of the two guideways is secured or securable at ground level by an anchorage.

Claim 17 (Original): Apparatus as claimed in Claim 16, wherein the anchorage comprises a stake or ground pin.

Claim 18 (Original): Apparatus as claimed in Claim 17, wherein the other end of each of the two guideways is attached to a stable support.

Claim 19 (Original). Apparatus as claimed in Claim 15, wherein means are provided for varying the length of the guideways and/or their angle of inclination above ground level.

Claim 20 (Original). Apparatus as claimed in Claim 15, wherein the reciprocating line is connected or connectable to the guideways through a slide.

Claim 21 (Original). Apparatus as claimed in Claim 20, wherein the slide comprises a hinged clip, ring, rope slide or adjustable loop.

Claim 22 (Original): Apparatus as claimed in Claim 15, wherein one or both guideways and/or the reciprocating means are made of a low friction material.

Claim 23 (Original): Apparatus as claimed in Claim 22, wherein the material comprises a plastic-covered cord or wire.

Claim 24 (Original): Apparatus as claimed in Claim 15, wherein one or both guideways are made of a substantially rigid material.

Claim 25 (Original): Apparatus as claimed in Claim 24, wherein one or both guideways takes the form of a plastic track which is capable of receiving a runner to which the reciprocating means is connected.

Claim 26 (Original): Apparatus as claimed in Claim 15, further comprising tensioning means for varying the tension of the or each guideway.

Claim 27 (Original): Apparatus as claimed in Claim 16, wherein the tensioning means comprises a reeling mechanism.

Claim 28 (Original): Apparatus as claimed in Claim 15, further comprising a backboard or target at which the user of the apparatus may aim when hitting the ball.

**APPENDIX 2**

**COPY OF JULY 25, 2003, OFFICE ACTION  
FINALLY REJECTING PENDING CLAIMS**



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/980,092	02/11/2002	Jan Abraham Van Asselt	VANASSETL.NEW1	8120

2779 7590 07/25/2003

BLANK ROME LLP  
THE FARRAGUT BUILDING SUITE 1000  
900 17TH STREET NW  
WASHINGTON, DC 20006

EXAMINER

HUNTER, ALVIN A

ART UNIT

PAPER NUMBER

3711

DATE MAILED: 07/25/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

DOCKETED  
115692.0101 KES  
amdt after final  
nrc of appeal due 10.25.03  
1st day 11.25.04

MAR 7 6 2004

**Office Action Summary**

Application No.

09/980,092

Applicant(s)

VAN ASSELT, JAN ABRAHAM

Examiner

Alvin A. Hunter

Art Unit

3711

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 14 May 2003.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 15-28 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 15-28 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☒ The proposed drawing correction filed on 14 May 2003 is: a) ☒ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 5.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152).
- 6) ☐ Other:

**DETAILED ACTION**

***Drawings***

1. The corrected or substitute drawings were received on May 14, 2003. These drawings are accepted.

***Specification***

2. The disclosure is objected to because of the following informalities: Specification should be amended to show reference numbers to the target and backboard within the drawings.

Appropriate correction is required.

***Claim Objections***

3. Claims 22, 24, 25 and 26 are objected to because of the following informalities:

a) In claims 22, 24 and 25, "one or both guideways" should read --at least one guideway--;

b) in claim 26, "of the or each guideway" should read -- of the at least one guideway-- .

Appropriate correction is required.

***Claim Rejections - 35 USC § 112***

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

4. Claims 15-28 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable



Art Unit: 3711

one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. What is the minimum spacing and maximum spacing of the guideways? What is the buffering and/or deflector<sup>28</sup> means? How is the tension<sup>26+27</sup> mechanism used? How is the inclination<sup>19</sup> varied? The above are just a few questions showing that the specification does not make it clear as how to make the invention.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 15-28 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 15 recites "... length greater than the minimum spacing of the guideways and less than the maximum spacing of the guideways ..." The claim and disclosure is deficient as what the minimum spacing and the maximum spacing should be and has been rejected. Claims 16-28 are also rejected for being dependent upon claim 15.

Claim 28 is rejected under 35 U.S.C. 112, second paragraph, as being incomplete for omitting essential elements, such omission amounting to a gap between the elements. See MPEP § 2172.01. The omitted elements are: means for connecting and holding the backboard or target to apparatus.

Claim 15 recites the limitation "the minimum spacing" and "the maximum spacing" in line 4. There is insufficient antecedent basis for this limitation in the claim.

Claim 18 recites the limitation "the other end" in line 1. There is insufficient antecedent basis for this limitation in the claim.

Claim 22 recites the limitation "the reciprocating means" in line 2. There is insufficient antecedent basis for this limitation in the claim.

Claim 25 recites the limitation "the reciprocating means" in lines 2 and 3. There is insufficient antecedent basis for this limitation in the claim.

Claim 28 recites the limitation "the user" in line 2. There is insufficient antecedent basis for this limitation in the claim.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 15-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gilbey-Thompson (GB 201645) in view of Lingbeek (USPN 3630521).

Gilbey-Thompson discloses a golf practice device wherein strokes may be practiced in a restricted area (See Provisional Specification). The device comprises two upwardly inclining diverging wires secured to the ground by stakes or poles wherein the wires carry a ball fastened by wires with a terminal ring (See lines 62 through 29).

Gilbey-Thompson does not disclose the wires being elastic. Lingbeek discloses a baseball batting practice device in which the ball (5) is attached to a line (4), or what the applicant calls a reciprocating means, which is attached to two low friction lines (2), or what the applicant calls guideways, via rings (3) to allow the ball to move along the low friction lines (See Entire Document). The low friction line may be a clothesline wire

Art Unit: 3711

(See Column 1). From a careful reading of Lingbeck, the low friction lines are submitted to be substantially inelastic, or rigid, being that the only deforming of any line is the line in which attaches the ball to the low friction line. Low friction line allows the ball to travel smoothly along the low friction line. One having ordinary skill in the art would have been motivated to use low friction lines, as taught by Lingbeck, in order to facilitate the smooth movement of the ball after it has be struck. A reeling means is inherent within Lingbeck being that the lines (2) are connected to a post (1). It appears that the lines may be wrapped around the post (1) for storage.

#### ***Response to Arguments***

Applicant's arguments with respect to claims 15-28 have been considered but are moot in view of the new ground(s) of rejection.

#### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Alvin A. Hunter whose telephone number is 703-306-5693. The examiner can normally be reached on Monday through Friday from 7:30AM to 4:00PM Eastern Time. No interview will be held after final rejection. Interviews after final will only be held if allowable subject matter has been indicated or to clear up errors by fault of the examiner.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Paul Sewell, can be reached on (703) 308-2126. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9302.

Application/Control Number: 09/980,092

Page 6

Art Unit: 3711

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1148.

Alvin A. Hunter, Jr.

7-11-11  
703-308-1148  
Receptionist

09/980092

Sheet 1 of 1

JC10 Rec L-CT/PTO 3 0 NOV 2001

Form PTO 1449 U.S. DEPARTMENT OF COMMERCE PATENT AND TRADEMARK OFFICE				ATTY DOCKET NO. VANASSEL.T.NEW		SERIAL NO. 09/980092 Nat'l Phase of PCT/GB00/02008	
LIST OF REFERENCES CITED BY APPLICANT				APPLICANT Jan Abraham VAN ASSELT			
				FILING DATE November 30, 2001		GROUP 3711	
U.S. PATENT DOCUMENTS							
EXAMINER INITIAL		DOCUMENT NUMBER	DATE	NAME	CLASS	SUB CLASS	FILING DATE IF APPROPRIATE
AAH	AA	3,460,391	08/12/1969	W.G. Lomas	73	379	
AAH	AB	3,630,521	12/28/1971	Lingbeek et al.	273	26	
AAH	AC	3,754,761	08/28/1973	Pruss	273	200	
AAH	AD	4,138,107	02/06/1979	Janis	273	29	
AAH	AE	4,944,513	07/31/1990	Zentner	273	26	
AAH	AF	5,762,562	06/09/1998	Tiedge	473	143	
	AG						
	AH						
	AI						
	AJ						
	AK						
	AL						
	AM						
	AN						
	AO						
	AP						
	AQ						
FOREIGN PATENT DOCUMENTS							
		DOCUMENT NUMBER	DATE	COUNTRY	TRANSLATION YES NO		
AAH	AR	115,588	05/16/1918	Great Britain			
AAH	AS	169,578	10/06/1921	Great Britain			
AAH	AT	201,645	08/03/1923	Great Britain			
	<del>AU</del>	<del>88 84 885</del>	<del>05/26/1988</del>	<del>Germany</del>			
AAH	AV	99/34884	07/15/1999	WIPO			
OTHER REFERENCES (Including Author, Title, Date, Pertinent Pages, etc.)							
	AW						
	AX						
	AY						
	AZ						
Examiner <i>[Signature]</i> AAH				Date Considered 12/10/02 7/16/03 AAH			

\*Examiner: Initial if reference is considered, whether or not citation is in conformance with MPEP 609; Draw line through citation if not in conformance and not considered. Include copy of this form with next communication to applicant.

**APPENDIX 3**

**COPY OF JANUARY 26, 2004,  
AMENDMENT AFTER FINAL REJECTION**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re U.S. Patent Application of	:	
	)	
Jan Abraham VAN ASSELT	:	Group Art Unit: 3711
	)	
Serial No.: 09/980,092	:	Examiner: A. Hunter
	)	
Filed: February 11, 2002	:	Attorney Docket: 115692-00101
	)	
For: BALL GAME APPARATUS	:	

**AMENDMENT AFTER FINAL REJECTION**

MS Non-Fee Amendment  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

In response to the Office Action of July 25, 2003, please amend the above-identified application as follows:

- (1) **Amendments to the specification** are shown on page 3 of this paper.
- (2) **Amendments to the claims** are reflected in the listing of claims that begin on page 4 of this paper.
- (3) **Remarks/Arguments** begin on page 7 of this paper.

Reconsideration and withdrawal of the outstanding Office Action and issuance of a Notice of Allowance are respectfully solicited in view of the amendments and accompanying remarks. In the event that any issues remain that can be overcome most easily through a telephone communication, the Examiner is invited to telephone the undersigned at the telephone number set forth below.

In order to render the filing of this paper timely, filed concurrently herewith is a Petition for three-months extension of time, together with a check in the amount of \$475 to cover the requisite fee for a small entity. Also filed herewith is a Notice of Appeal.

Please charge any deficiency in fees, or credit any overpayment thereof, to BLANK ROME LLP, Deposit Account No. 23-2185 (115692-00101). If a petition for extension of time is required to render this submission timely and either is not filed concurrently herewith or does not suffice to render this submission timely, the Applicant hereby petitions under 37 C.F.R. §1.136(a) for such an extension for as many months as are required to render this submission timely. Any fee due is authorized above.

Respectfully submitted,

*Charles R. Wolfe, Jr.*  
*by Michael O. White*  
*Reg. No. 32,795*

Charles R. Wolfe, Jr.  
Attorney for Applicant  
Registration No. 28,680

BLANK ROME, LLP  
Watergate  
600 New Hampshire Ave., N.W.  
Washington, D.C. 20037  
Telephone: (202) 772-5800

Date: January 26, 2004



**AMENDMENTS TO THE SPECIFICATION:**

Please delete the last paragraph of the specification on page 4 of the application and replace it with the following corrected paragraph. A marked-up version of the paragraph is shown on the next page:

-- The apparatus may also comprise a buffer or deflector at any position along the guideways to return the reciprocating means back to the user after the ball is struck. The backboard or target acts as a buffer or deflector.--

Please delete the last paragraph of the specification, just before the claims, and replace it with the following corrected paragraph. A marked-up version of the paragraph is shown on the next page.

--It will be appreciated that the foregoing is merely exemplary of embodiments of the invention and that modifications can readily be made without departing from the scope of the invention as set out in the appended claims. Thus, the supports 2 may be replaced by a frame comprising a pair of interconnected tripods to which the upper end of the guideways are secured. A target or rebound board 12 may be supported between the tripods in the path of trajectory of the ball.--

**Version of Specification Showing Changes Made**

**1. Last paragraph, page 4:**

--The apparatus may also comprise [buffering and/or deflecting means] a buffer or deflector at any position along the guideways to return the reciprocating means back to the user after the ball is struck. The backboard or target [may also act as a] acts as a [buffering and/or deflecting means] buffer or deflector.--

**2. Last paragraph before the claims:**

--It will be appreciated that the foregoing is merely exemplary of embodiments of the invention and that modifications can readily be made without departing from the scope of the invention as set out in the appended claims. Thus, the supports 2 may be replaced by a frame comprising a pair of interconnected tripods to which the upper end of the guideways are secured. A target or rebound board 12 may be supported between the tripods in the path of trajectory of the ball.--

**AMENDMENTS TO THE CLAIMS:**

**Listing of claims**

Claims 1 - 14 (Cancelled).

Claim 15 (Currently Amended). Apparatus for improving the skill of a sports person which comprises two upwardly inclined side by side diverging guideways, a substantially inelastic reciprocating line connected to and freely movable along said guideways, whose length is equal to or greater than [the] a minimum spacing of the guideways and less than [the] a maximum spacing of the guideways and a ball connected to and generally coaxial with said reciprocating line.

Claim 16 (Currently Amended). Apparatus as claimed in Claim 16, wherein [one] a first end of each of the two guideways is secured or securable at ground level by an anchorage.

Claim 17 (Original). Apparatus as claimed in Claim 16, wherein the anchorage comprises a stake or ground pin.

Claim 18 (Currently Amended). Apparatus as claimed in Claim 17, wherein [the other] a second end of each of the two guideways is attached to a stable support.

Claim 19 (Original). Apparatus as claimed in Claim 15, wherein means are provided for varying the length of the guideways and/or their angle of inclination above ground level.

Claim 20 (Original). Apparatus as claimed in Claim 15, wherein the reciprocating line is connected or connectable to the guideways through a slide.

Claim 21 (Original). Apparatus as claimed in Claim 20, wherein the slide comprises a hinged clip, ring, rope slide or adjustable loop.

Claim 22 (Currently Amended). Apparatus as claimed in Claim 15, wherein [one or both] at least one guideway[s] and[/or] the reciprocating [means] line are made of a low friction material.

Claim 23 (Original). Apparatus as claimed in Claim 22, wherein the material comprises a plastic-covered cord or wire.

Claim 24 (Currently Amended). Apparatus as claimed in Claim 15, wherein [one or both] at least one guideway[s] [are] is made of a substantially rigid material.

Claim 25 (Currently Amended). Apparatus as claimed in Claim 24, wherein [one or both] at least one guideway[s] takes the form of a plastic track which is capable of receiving a runner to which the reciprocating [means] line is connected.

Claim 26 (Currently Amended). Apparatus as claimed in Claim 15, further comprising tensioning means for varying the tension of the [or each] at least one guideway.

Claim 27 (Original). Apparatus as claimed in Claim 16, wherein the tensioning means comprises a reeling mechanism.

Claim 28 (Currently Amended). Apparatus as claimed in Claim 15, further comprising a backboard or target at which [the user of the apparatus may aim when hitting] the ball may be aimed, wherein the backboard or target is positioned in the path of a trajectory of the ball.

Claim 29 (New). Apparatus as claimed in Claim 28, wherein the backboard or target is oriented substantially perpendicular to the longitudinal axis of the guideways and located between the diverging guideways at a point along the guideways between the first ends of each of the two guideways where they are secured or securable at ground level by an

*Serial Number: 09/980,092*  
*Group Art Unit: 3711*

anchorage and the second ends of each of the two guideways where they are attached to a stable support.

**REMARKS:**

The Office Action dated July 25, 2003, has been carefully considered. In response thereto, the present application has been amended in a manner that is believed to place it into condition for allowance. Accordingly, reconsideration and withdrawal of the outstanding final Office Action and issuance of a Notice of Allowance are respectfully requested.

In the present Office Action, the Examiner has accepted the new drawing submitted (received by the PTO) May 14, 2003, objected to the specification, and objected to claims 22, 24, 25 and 26. In addition, the Examiner has rejected claims 15-28 under 35 U.S.C. § 112, first and second paragraphs and rejected claims 15-27 under 35 U.S.C. § 103(a). As discussed below, Applicant has addressed each of those objections and rejections.

**Drawing:**

Applicant acknowledges that the corrected and substitute drawing submitted to the PTO on May 14, 2003, has been accepted by the Examiner. A final drawing, without correction marks, is enclosed herewith for the record.

**Claims Numbering:**

Claims 15-29 are pending in the application. As noted in Applicant's previous paper, the claims were incorrectly numbered in Applicant's November 30, 2001, Preliminary Amendment. However, a complete listing of the pending claims was not provided with that paper showing the proper number sequence. This paper contains a complete listing and status of the claims pending in the application.

**Specification Objections:**

Applicant submits that the updated specification, adding the reference number "12" for the target or rebound board (as shown in corrected FIG. 1 of the application), adequately responds to and overcomes the Examiner's objection of the specification. Withdrawal of the objection is respectfully requested.

**Claim Objections:**

Claims 22, 24 and 25 have been objected to under 35 U.S.C. § 112, first paragraph, because "one or both guideways" should read "at least one guideway." Claim 26 has been objected to under 35 U.S.C. § 112, first paragraph, because "of the or each guideway" should read "of the at least one guideway."

Applicant has amended the claims according to the Examiner's suggestions. Applicant wishes to point out that those amendments do not narrow the scope of the claimed invention. Thus, Applicant is entitled to the full scope of protection afforded the claimed invention without limitation (subject to any relevant prior art).

**Claim Rejection - 35 U.S.C. § 112, first paragraph:**

As noted previously, the Examiner has rejected claims 15-28 under 35 U.S.C. § 112, first paragraph. That is, the Examiner asserts that the claims recite subject matter that was not described in the specification so as to enable one of ordinary skill in the art to make and/or use the invention. The basis for the Examiner's rejection is essentially a repeat of his previous rejection contained in the December 12, 2002, Office Action. The Examiner questions whether the written description adequately conveys information to answer the following exemplary questions: (1) What is the minimum spacing and maximum spacing of the guideways?; (2) What is the buffering and/or deflector means?; (3) How is the tension mechanism used?; (4) How is the inclination varied?

As Applicant understands the Examiner's comments, the rejection is based on the portion of 35 U.S.C. §112, first paragraph, dealing with enablement. For the reasons described below (and in Applicant's previous submitted papers), Applicant respectfully submits that the Examiner has not established a prima facie case of lack of enablement under 35 U.S.C. §112, first paragraph.

"The enablement requirement is satisfied when one skilled in the art, after reading the specification, could practice the claimed invention without undue experimentation." AK Steel Corp. v. Sollac, 68 U.S.P.Q.2d 1280, 1287 (Fed. Cir. 2003) (citing cases). "The determination of what constitutes undue experimentation in a given case requires the application of a standard of reasonableness, having due regard for the nature of the invention and the state of the art." In re Wands, 8 U.S.P.Q.2d 1400, 1404 (Fed. Cir. 1988) (citing

Ansul Co. v. Uniroyal, Inc., 169 U.S.P.Q. 759, 762-63 (2d Cir. 1971), cert. denied, 172 U.S.P.Q. 257 (1972)). “The test is not merely quantitative, since a considerable amount of experimentation is permissible, if it is merely routine, *or if the specification in question provides a reasonable amount of guidance with respect to the direction in which the experimentation should proceed.*” Id. (emphasis added).

**1. What is the minimum spacing and maximum spacing of the guideways?**

As disclosed in the specification, the guideways diverge, the minimum separation distance between the guideways is less than the length of the inelastic reciprocating line, and the maximum separation distance is greater than the line length. Thus, the minimum and maximum spacings between the guideways are dictated by the length of the line and (vice versa) by the fact that the guideways diverge. Accordingly, one skilled in the art, after reading the specification, could practice the claimed invention without undue experimentation because the specification provides a reasonable amount of guidance with respect to the direction in which the experimentation should proceed. While it may require some adjustments of the guideways to find an appropriate divergence and line lengths (and hence the spacing of the guideways), that “experimentation” is not “undue.” For that reason, there is no need to recite a minimum or maximum spacing for the guideways to enable the claimed invention.

**2. What is the buffering and/or deflector means?**

Under 35 U.S.C. §112, first paragraph, the statute requires “only that the inventor enable one of skill in the art to make and use the full scope of the *claimed invention.*” CFMT Inc. v. Yieldup International Corp., 68 U.S.P.Q.2d 1940, 1944 (Fed. Cir. 2003) (emphasis added). Thus, it is the claimed invention that the enablement requirement applies to. In this case, there are no claims directed to a buffering and/or deflector means. Thus, the Examiner’s rejection is improper to the extent it is directed to the enablement requirement.

However, to clarify this issue, the specification has been amended to state that it is the backboard or target 12, as shown in FIG. 1 in the alternate position between the tee-off mat 10 and the supports 2, that is the structure corresponding to the deflector (the “buffer” and “means” terms being deleted from the specification). New claim 29 is directed to the



backboard or target being used as a deflector. Because FIG. 1 clearly shows a backboard or target, which can act as a deflector, the specification is enabling with respect to the invention claimed in claim 29.

**3. How is the tension mechanism used?**

Claims 26 and 27 are directed to the tensioning means. The tensioning means simply comprises, for each guideway, a reel around which a guideway is wound. A greater or lesser winding imposes variations in the tension in the guideways. This is clearly described in the specification on page 4 of the application. A person skilled in the art would understand from the specification that there are many ways in which the tension of each guideway can be varied, one of which comprises the reel referred to in the specification. Applicant submits that no, or at the very least only a very little, experimentation would be required to tighten the guideways, especially where the specification provides a roadmap for using a simple reeling mechanism. Accordingly, the specification is enabling with respect to the invention claimed in claims 26 and 27.

**4. How is the inclination varied?**

Again, from the perspective of one of ordinary skill in the art, there can be no doubt that little, if any, experimentation would be required to determine how to use the invention disclosed in the specification, specifically how it can be manipulated to incline the guideways as shown in FIG. 1. The inclination can simply be varied by increasing or reducing the distance between the anchorages and the stable support, or by varying the height of the support. Applicant respectfully submits that the Examiner has not established that the specification lacks enablement.

For the above reasons, Applicant respectfully submits that the Examiner has not established a prima facie case of lack of enablement under 35 U.S.C. §112, first paragraph, and respectfully requests that the rejection of the claims on that basis be withdrawn.

**Claim Rejection - 35 U.S.C. § 112, second paragraph:**

The Examiner has rejected claim 15 (and dependent claims 16-28) as being indefinite because the minimum and maximum spacing of the guideways is not recited. For the reasons described below, Applicant respectfully submits that the Examiner has not established that claim 15 is indefinite under 35 U.S.C. §112, second paragraph.

As the Federal Circuit has stated many times, “[I]f the claims read in light of the specification reasonably apprise those skilled in the art of the scope of the invention, § 112 [second paragraph] demands no more.” Miles Lab., Inc. v. Shandon, Inc., 27 U.S.P.Q.2d 1123, 1140 (Fed. Cir. 1993); Honeywell Int’l, Inc. v. ITC, 68 U.S.P.Q.2d 1023, 1028 (Fed. Cir. 2003) (citing cases) (“The definiteness requirement [] focuses on whether the claims, as interpreted in view of the written description, adequately perform their function of notifying the public of the scope of the patentee’s right to exclude.”).

Applicant regards as his invention the combination of elements disclosed in the specification including diverging guideways and a substantially inelastic line that is longer than the minimum separation of the guideways and shorter than the maximum separation of the guideways. In fact, as any person of ordinary skill would conclude, the recitation of elements in claim 15 can be summed up as follows: for a line having length “x,” the distance between the guideways at their closest or minimum separation is less than “x” and the distance between the guideways that at their maximum separation is greater than “x.” The actual minimum and maximum distances are not relevant. Thus, the claim reads on any length “x,” and thus any minimum and maximum separation distances, limited only by the relevant prior art. Thus, the claim is definite because it reasonably apprises those skilled in the art of the scope of the invention. Obviously, one of ordinary skill will understand that the invention will not work in the manner disclosed in the specification if the “substantially inelastic reciprocating line” is one mile long, or, conversely, one millimeter long. But those, or other limits, do not have to be recited in the claim to make the claim definite and satisfy § 112, second paragraph. Therefore, Applicant respectfully requests that the rejections of claim 15 be withdrawn.

With regard to claim 28, Applicant has amended the claim to recite the physical relationship between the backboard or target and the rest of the apparatus. As disclosed in the specification, “[t]he target may be placed at any position remote from [] the lower end of

the guideways.” Thus, it could be positioned behind the device so that it does not actually physically touch the device as shown in FIG. 1. Accordingly, the new language added to claim 28, “wherein the backboard or target is positioned in the path of a trajectory of the ball,” provides the relationship between the apparatus and the backboard or target and is adequately supported by the written description of the invention. Withdrawal of the rejection of claim 28 is respectfully requested.

With regard to the antecedent basis problems: (1) claim 15 has been amended to replace “the” with “a,” where applicable, to address the Examiner’s rejection; (2) claims 16 and 18 have been amended to recite “first” and “second” ends of the guideways, respectively, rather than “one end” and the “other end”; (3) claims 22 and 25 have been amended to replace the typographical error “reciprocating means” with the correct “reciprocating line” term; and (4) claim 28 has been amended to omit the reference to “the user.” Applicant wishes to point out that those amendments do not narrow the scope of the claimed inventions recited in those claims. Thus, Applicant is entitled to the full scope of protection afforded the claimed inventions without limitation (subject to any relevant prior art).

#### **Claim Rejection - 35 U.S.C. § 103(a)**

The Examiner has rejected claims 15-27 under 35 U.S.C. § 103(a), as being unpatentable over Great Britain Patent No. GB 201,645 to *Gilbey-Thompson* in view of U.S. Patent No. 3,630,521 to *Lingbeek*. For the reasons noted below, Applicant respectfully traverses the Examiner’s rejection on the basis of those two references and submits that the Examiner has failed to establish a prima facie case of obviousness.

*Gilbey-Thompson* discloses a golf practicing device which comprises two slightly diverging wires or cords secured between ground anchors and a pair of upstanding stakes. *Lingbeek* discloses an apparatus for practicing baseball swings in which a ball is attached to an elastic line stretched between two spaced apart horizontal guideways supported by spaced apart vertical supports. Applicant submits that those references do not render the invention recited in claims 15-27 of the present application unpatentable because there is no teaching or motivation to combine them to come up with the present invention.

Although there are some similarities, the main differences between the device disclosed in *Gilbey-Thompson* and that of the present invention is the manner in which the

ball is secured to the reciprocating line. As recited in claim 15, the invention includes "a ball connected to and generally coaxial with the reciprocating line." In *Gilbey-Thompson* the ball is attached to the reciprocating line by a cord which is in turn secured to the reciprocating line through a ring. The function of the reciprocating cord is to communicate to the player whether the ball was struck squarely, pulled or sliced. The intention is that the ball will remain at some position between the lines remote from the striking position, the distance of the ball from a center line between the diverging lines providing an indication as to the manner in which the ball was struck.

That system is contrary to the present application where the ball is caused by the reaction between the inelastic ball carrying line and the diverging guideways to produce a whip-like reaction which causes the reciprocating line with the ball attached to return to the original striking position. It is the line connecting the ball to the reciprocating line of *Gilbey-Thompson* which prevents the return of the ball to the striking position. In the present application, it is the location of the ball generally coaxial with the reciprocating line which enables the ball to be returned in the manner described in the specification. Thus, claim 15 is clearly distinguished over the teaching of *Gilbey-Thompson*.

There are obvious distinctions between the reciprocating means described in *Lingbeek* and that of the invention claimed in the subject application, which was discussed at length in Applicant's previous paper. The main distinction between the present claimed invention and the disclosure in *Lingbeek* is that in *Lingbeek* the reciprocating means is positioned between two spaced apart horizontal guideways that are parallel (i.e., they do not diverge) and that the reciprocating line of *Lingbeek* is elastic. In *Lingbeek*, the elastic line converts the kinetic energy of the ball after it is struck by a bat into potential energy which is then used to propel the ball back to the player. Thus, claim 15 is clearly distinguished over the teaching of *Lingbeek*.

As understood from the Examiner's reason for the obviousness rejection, *Gilbey-Thompson* teaches every element of the claims except it does not disclose wires being elastic, but that *Lingbeek* discloses low friction lines that enhance travel of the lines connected to the guideways and one of ordinary skill in the art would have been motivated to use low friction lines taught in *Lingbeek* in place of the non-elastic lines in *Gilbey-Thompson* to facilitate the smooth movement of the ball of the present invention after it has been struck.

Applicant submits that the Examiner's reasoning does not establish a prima facie case of obviousness. The main differences between the present claimed invention and the teachings of *Gilbey-Thompson* and *Lingbeek* are not addressed by the combination of the two patents. Modifying the non-elastic wires in *Gilbey-Thompson* with the so-called low friction guideways taught in *Lingbeek* would not result in the a device that operates like the present invention that has two diverging guideways, a substantially inelastic reciprocating line between the two guideways, and a ball connected to and generally coaxial with the substantially inelastic reciprocating line.

And even if the two references did teach that combination of elements, which Applicant submits they do not, the Examiner has not stated any motivation to combine those two references to come up with the *claimed invention* recited in claim 15 that operates in the way disclosed in the specification. The motivation cited by the Examiner – to facilitate the smooth movement of the ball after it has been struck – is not the purpose of the diverging guideways and substantially inelastic reciprocating line. Therefore, one of ordinary skill in the art would not have been motivated to use *Lingbeek* to modify the teaching in *Gibley-Thompson* to come up with the present invention. Withdrawal of the obviousness rejection is respectfully requested.

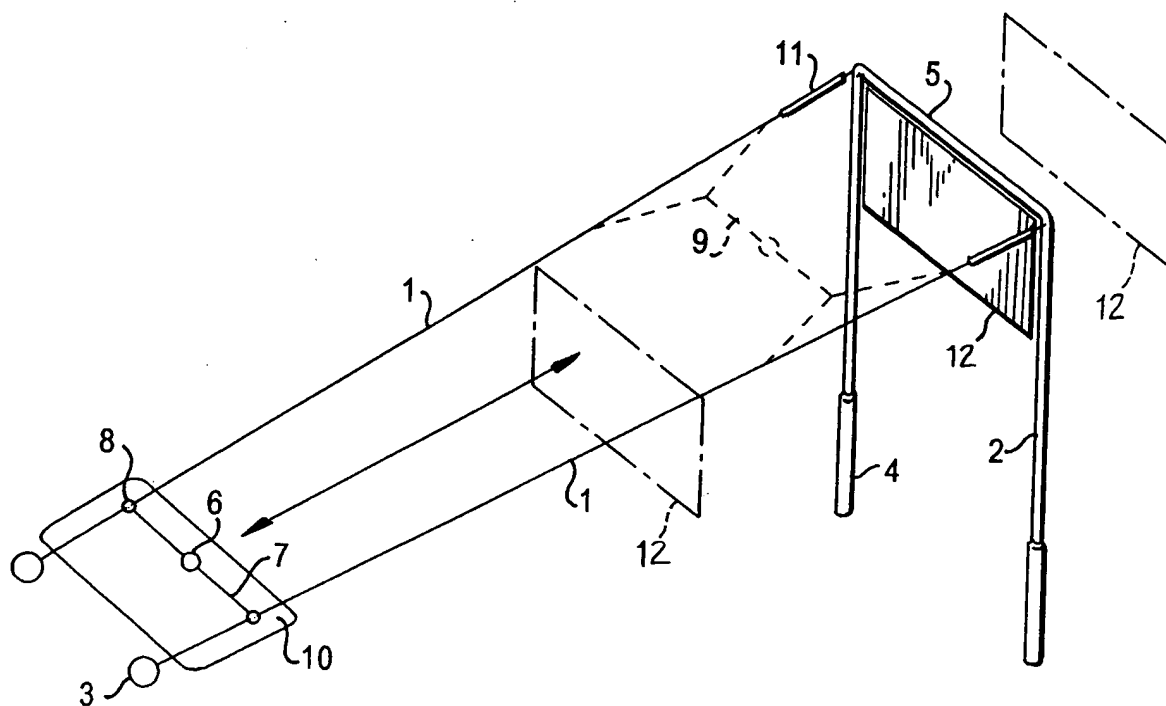


FIG. 1

**APPENDIX 4**  
**COPY OF FEBRUARY 10, 2004,**  
**ADVISORY ACTION**



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
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OPW  
BA

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/980,092 ✓	02/11/2002	Jan Abraham Van Asselt	VANASSETT.NEW1	8120
2779	7590	02/10/2004		
BLANK ROME LLP THE FARRAGUT BUILDING SUITE 1000 900 17TH STREET NW WASHINGTON, DC 20006				
			EXAMINER HUNTER, ALVIN A	
			ART UNIT 3711	PAPER NUMBER

DATE MAILED: 02/10/2004

BLANK ROME LLP  
FEB 12 2004  
RECEIVED  
COUNSELORS AT LAW

Please find below and/or attached an Office communication concerning this application or proceeding.

DOCKETED  
115692.010/Jan  
Appeal Brief 3/24/04  
Action Due



**Advisory Action**

Application No.

09/980,092

Applicant(s)

VAN ASSELT, JAN ABRAHAM

Examiner

Alvin A. Hunter

Art Unit

3711

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 26 January 2004 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

**PERIOD FOR REPLY** [check either a) or b)]

- a) ☒ The period for reply expires 6 months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on \_\_\_\_\_. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☒ The proposed amendment(s) will not be entered because:
- (a) ☒ they raise new issues that would require further consideration and/or search (see NOTE below);
  - (b) ☐ they raise the issue of new matter (see Note below);
  - (c) ☒ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
  - (d) ☒ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet.

3. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.
4. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☐ The a) ☐ affidavit, b) ☐ exhibit, or c) ☐ request for reconsideration has been considered but does NOT place the application in condition for allowance because: \_\_\_\_\_.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☒ For purposes of Appeal, the proposed amendment(s) a) ☒ will not be entered or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: \_\_\_\_\_.

Claim(s) objected to: \_\_\_\_\_.

Claim(s) rejected: 15-28.

Claim(s) withdrawn from consideration: \_\_\_\_\_.

8. ☐ The drawing correction filed on \_\_\_\_\_ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). \_\_\_\_\_.
10. ☐ Other: \_\_\_\_\_

  
GREGORY VIDOVICH  
SUPERVISORY PATENT EXAMINER  
TECHNOLOGY CENTER 3700

Continuation of 2. NOTE: Claim 28 contains additional limitations that would require further consideration and/or search. Claim 29 was not pending prior to final rejection and would also require further consideration.

# FEE TRANSMITTAL for FY 2004

Patent fees are subject to annual revision.

Complete if Known

Application Number 09/980,092  
Filing Date February 11, 2002  
First Named Inventor Jan Abraham VAN ASSELT  
Examiner Name Alivan A. HUNTER  
Group / Art Unit 3711  
Attorney Docket No. 115692-00101

TOTAL AMOUNT OF PAYMENT (\$ 165.00

## METHOD OF PAYMENT (check one)

1. ☒

The Commissioner is hereby authorized to charge indicated fees and credit any over payments to:

Deposit  
Account  
Number

23-2185

Deposit  
Account  
Name

BLANK ROME LLP

- ☒ Charge Any Additional Fee Required  
Under 37 CFR 1.16 and 1.17  
☒ Applicant claims small entity status.  
See 37 CFR 1.27

2. ☐ Payment Enclosed:

☐ Check ☐ Credit card ☐ Money  
Order ☐ Other

## FEE CALCULATION

### 1. BASIC FILING FEE

Large Fee Code	Entity Fee (\$)	Small Fee Code	Entity Fee (\$)	Fee Description	Fee Paid
101	770	201	385	Utility filing fee	
106	340	206	170	Design filing fee	
107	530	207	265	Plant filing fee	
108	770	208	385	Reissue filing fee	
114	160	214	80	Provisional filing fee	

SUBTOTAL (1)

(\$ 0

### 2. EXTRA CLAIM FEES

Total Claims  -20\*\* =  0 X  \$18 =  \$0  
Independent Claims  -3\*\* =  0 X  \$86 =  \$0  
Multiple Dependent  \$290

Large Fee Code	Entity Fee (\$)	Small Fee Code	Entity Fee (\$)	Fee Description
103	18	203	9	Claims in excess of 20
102	86	202	42	Independent claims in excess of 3
104	290	204	140	Multiple dependent claim, if not paid
109	86	209	42	** Reissue independent claims over original patent
110	18	210	9	** Reissue claims in excess of 20 and over original patent

SUBTOTAL (2)

(\$)

\*\*or number previously paid, if greater; For Reissues, see above

## FEE CALCULATION (continued)

Fee Code	Large Entity Fee (\$)	Fee Code	Small Entity Fee (\$)	Fee Description	Fee Paid
105	130	205	65	Surcharge - late filing fee or oath	
127	50	227	25	Surcharge - late provisional filing fee or cover sheet.	
139	130	139	130	Non-English specification	
147	2,520	147	2,520	For filing a request for reexamination	
112	920*	112	920*	Requesting publication of SIR prior to Examiner action	
113	1,840*	113	1,840*	Requesting publication of SIR after Examiner action	
115	110	215	55	Extension for reply within first month	
116	420	216	210	Extension for reply within second month	
117	950	217	475	Extension for reply within third month	
118	1,480	218	740	Extension for reply within fourth month	
128	2,010	228	1,005	Extension for reply within fifth month	
119	330	219	165	Notice of Appeal	
120	330	220	165	Filing a brief in support of an appeal	165.00
121	280	221	145	Request for oral hearing	
138	1,510	138	1,510	Petition to institute a public use proceeding	
140	110	240	55	Petition to revive - unavoidable	
141	1,330	241	665	Petition to revive - unintentional	
142	1,330	242	665	Utility issue fee (or reissue)	
143	480	243	240	Design issue fee	
144	640	244	320	Plant issue fee	
122	130	122	130	Petitions to the Commissioner	
123	50	123	50	Processing fee for provisional applications	
126	180	126	180	Submission of Information Disclosure Stmt	
581	40	581	40	Recording each patent assignment per property (times number of properties)	
146	770	246	385	Filing a submission after final rejection (37 CFR § 1.129(a))	
149	770	249	385	For each additional invention to be examined (37 CFR § 1.129(b))	
179	770	279	385	Request for Continued Examination (RCE)	
169	900	169	900	Request for expedited examination of a design application	

Other fee (specify) \_\_\_\_\_

\*Reduced by Basic Filing Fee Paid

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27557

PATENT TRADEMARK OFFICE

## SUBMITTED BY

Complete (if applicable)

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Telephone

202-772-5800

Signature

Date

March 26, 2004